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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

**No. 72-1187**

M. BROWNING COMBS, ET AL, *Petitioners*

*v.*

PRINCESS RANOLA JOHNSON, ET AL, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## Petition for Rehearing

Petitioners herein respectfully move this Court for an Order (1) vacating its denial of the petition for Writ of Certiorari, entered on June 25, 1973, and (2) granting the Petition. As grounds for their Motion, Petitioners state the following:

1. The decisions of the lower courts and the denial of Certiorari in this case are contrary to *Keyes v. School District No. 1, Denver, Co.*, 41 L.W. 5002, decided June 21, 1973.

The *Keyes* standard, if applied to the Grand Prairie Independent School District, requires summary disposition in favor of the school district because the trial court found as a fact that the "intent" of the school district had been to operate a unitary system throughout the school district and that it did so, except for

one neighborhood elementary school with a racially imbalanced student body only. Such finding of fact, under the *Keyes* rationale, created a presumption the school district was operating a unitary system that was not rebutted by the plaintiffs.

The exact language of the District Court opinion is as follows:

> Finally, the Court would like to commend the District and its Superintendent for their efforts to convert from a dual to a unitary school system. This Court is fully satisfied that the plans adopted for the middle and high school level of education meet the constitutional requirements of a unitary school system for these grades. It is only at the elementary level that this Court can find fault, and this at only one school. (Dist.Ct. Opinion, Pet. for Writ of Certiorari, P. 30)

The Dalworth Elementary School, of which complaint was made, was not a segregated school under the *Keyes* standard, the Court therein having held:

> In addition to the racial and ethnic composition of a school's student body, other factors such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school must be taken into consideration.

Had the "other factors" mentioned in *Keyes* been taken into consideration by the District Court with regard to the Dalworth school, the only finding possible under that evidence would have been that Dalworth was not a segregated school.

*Keyes* held that the differentiating factor between de jure segregation and de facto segregation is purpose or intent to segregate. The requisite finding of intent by the school board to segregate was not made by the trial court in this case.

*Swann*[1] and *Keyes* each create presumptions that may exist in school cases. *Keyes* held that intentionally segregative school board actions in a meaningful portion of a school system create a presumption that the school district operates a dual system, but that such presumption is rebuttable. *Swann* held that in a system with a history of segregation where there are schools that are substantially disproportionate in their racial composition, there is a presumption that the school district operates a dual system, but the lower courts held in this case that such presumption was conclusive. If the lower courts' holdings are sustained, then a different evidentiary standard obtains for the South, contrary to Public Law 92-318, Section 805, 20 U.S.C. §1655 (The Education Amendments of 1972) which provides:

> Sec. 805. The rules of evidence required to prove that state or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

According to Wigmore, there cannot be such a thing as a "Conclusive Presumption".

> In strictness, there cannot be such a thing as a "conclusive presumption". Wherever from one

[1]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)

> fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and *to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.* IX Wigmore, Evidence, p. 292, §2492 (3d ed 1940) (Emphasis added)

Contrary to Wigmore and the rationale of *Keyes*, the "Conclusive Presumption" is alive and well in this case under the lower courts' interpretation of *Swann*.

The lower courts in this case erroneously made the "Presumption" of *Swann* conclusive and converted such presumption into a rule of substantive law whereby once a finding of student racial imbalance in a single neighborhood elementary school was made, the school district was denied unitary status and became subject to federal court control.

Petitioners respectfully submit that upon evidence by the school board that it had (a) integrated faculties and administration; (b) scrupulously assured equality of facilities, instruction and curricula opportunities throughout the district; (c) utilized their authority to draw attendance zones to provide integration; and (d) located new schools, closed old ones and determined the size and grade categories with full integration in mind; that any presumption that the

Dalworth Elementary School precluded the Grand Prairie Independent School District from unitary status disappeared, and when plaintiffs' failed to produce evidence as to discrimination, their case failed.

Such is consistent with *Keyes* and the law of presumptions according to Wigmore:

> The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time upon a given party. *If it is, and he removes it by producing contrary evidence, then that presumption, as a rule of law, is satisfied and disappears;* IX Wigmore, Evidence 292 §2493 (3d ed. 1940) (Emphasis added)

*Keyes* held that at the point where an intentionally segregated policy is practiced in a meaningful or significant segment of a school system, it is fair to require the school authorities to bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent. Application of this rationale requires that where an intentionally integrative policy is practiced in a meaningful or significant segment of a school system, it is fair to require those alleging discrimination to bear the burden of producing evidence of discrimination. Under *Keyes* the existence of a single neighborhood elementary school whose only offense was a racially imbalanced student body, does not, without other factors, create a segregated school,

much less raise a conclusive presumption that is dispositive of the case.

*Keyes* further held that:

> ". . . a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."

The other side of the coin would be that a finding of intentional integration in a major portion of a school system creates a presumption that one instance of racial imbalance within the system is adventitious. It establishes a prima facie case of operation of a unitary system by school authorities and shifts to those alleging discrimination the burden of proving that segregated schools within the system are the result of intentionally segregative actions.

The law of *Keyes* being that

> . . . there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system;

then fairness dictates that where school authorities have effectuated an intentionally integrative policy

throughout the school system, similar permissible considerations have motivated their actions in other areas of the sytem.

## CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari and specifically for the reason that under the criteria of *Keyes* the Dalworth Elementary School was not a segregated school, Petitioners pray that this Court grant rehearing of the order of denial, vacate the order, grant the Petition and review the Judgment and opinion below. Petitioners suggest that on the record, summary reversal is in order.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

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